(a) *Canada*: the expenditure limit for parties fielding candidates in all 308 electoral districts in the 2004 election was $15,311,868; candidate expenditure for that election was limited at about $52,412 to $84,849 depending on the population of the district.[5]

(b) *New Zealand*: the expenditure limit in the 2005 election for parties fielding candidates in all 69 electoral districts was $2,336,000; the limit for candidates was $13,750.[6]

(c) *United Kingdom*: the expenditure limit in the 2005 election for parties fielding candidates in all 646 electoral districts was approximately $35,000,000; the limit for candidates was approximately $14,000.[7]

Of the eight common law democracies, each country that regulates expenditures (Canada, the United Kingdom, New Zealand, and Malta) also places limits on contributions, while Ireland and the United States limit only contributions, and

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Census Bureau, "International Data Base," available at <http://www.census.gov/ipc/www/idbnew.html>; CIA, "The World Factbook," available at <http://www.cia.gov/cia/publications/factbook/>. Of course parties and party funding play a more prominent role in parliamentary democracies and thus parties strategically use party funds in constituency races.

[5] *See* Elections Canada, "Election Handbook for Candidates," available at <http://www.elections.ca/content.asp?section=pol&document=index&dir=can/EC20190&lang=e&textonly=false>. All figures are transformed into U.S. dollars at the most current rate of exchange.

[6] Elections New Zealand, "Election Expenses and Returns," available at <http://www.elections.org.nz/elections/e5_party_return_expenses.html>.

[7] *See* Richard Kelley, "Election Expenses Limit," <http://www.parliament.uk/commons/lib/research/notes/snpc-03413.pdf>.

Australia and Jamaica regulate neither.[8] The different ways in which democracies most similar to the United States regulate campaign spending have important implications for electoral competition in these countries.

There are four widely used measures of electoral competitiveness: average size of electoral majority, percent of competitive races, incumbent reelection rate, and percent of uncontested races. Significantly, these show that U.S. legislative elections are much less competitive than elections held in other common law democracies.

An *electoral majority* is the difference between the winning candidate's percent of the vote and the vote percent of the next largest vote-getter. The smaller this difference is for any single race and for all races in an election, the more competitive the election is overall. Averaging each candidate's winning majority for each constituency, therefore, provides a measure of the overall competitiveness of an election.

FIGURE 1 reveals that 4 of the 5 countries (Canada, Malta, New Zealand, and the United Kingdom) with the most competitive elections (smallest average majorities of legislative race winners) place ceilings on candidate and party spending, and that all three of the countries with the least competitive elections (Ireland, Jamaica, and the United States) do not regulate overall spending. Moreover, countries with limits on expenditures average winning majorities of 20.71% across all of their elections as compared with average majorities of 25.45% in countries that do not regulate campaign spending. In other words, among this group, candidates in an average legislative race in countries *without* limits win elections by

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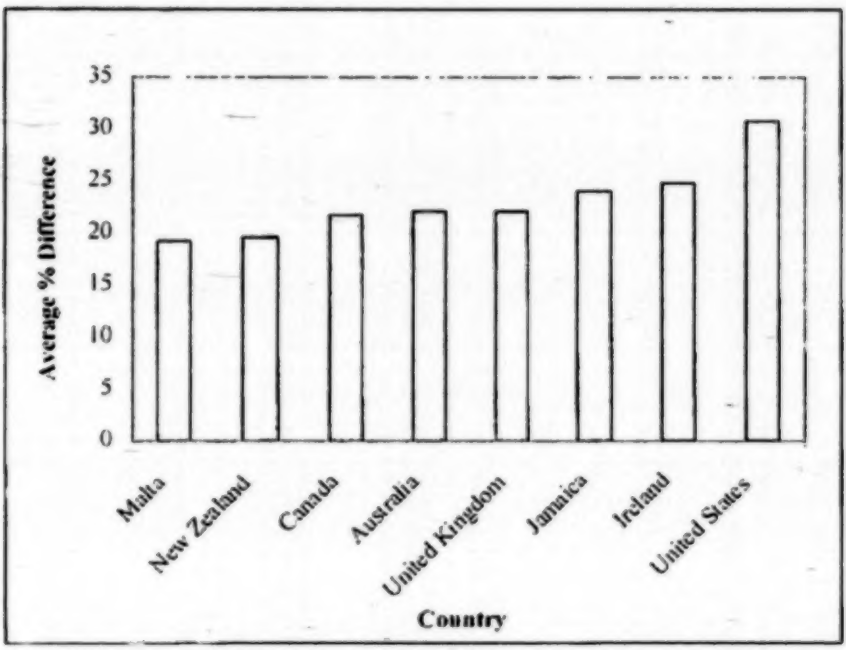
[8] Again, Jamaica (at least on paper, if not in practice), and Ireland regulate candidate, but not party expenditures. *See* n.3, *supra.*

*greater* majorities with less competition than in countries with spending limits.

Whatever the cause of greater competition, one cannot make the argument that capping expenditures automatically reduces competition because these cases suggest the opposite.

Figure 1: Electoral Competition in Eight Common Law Democracies, 1997-2005[1]

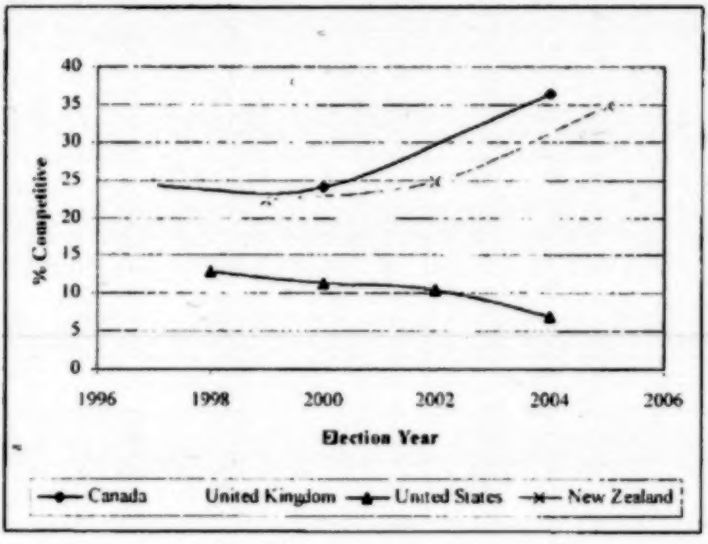



[1]**Average % Difference** is a measure of the size of the electoral majority of each winning legislative candidate over her nearest competitor. To calculate the statistic, each winner's percent of the vote is subtracted from the vote percent of the next largest vote-getter. These percent differences are then averaged. Smaller winning majorities mean more competition. U.S. elections include both House and Senate races.

*Source*: Australian Electoral Commission, <http://www.aec.gov.au/>; Elections Canada, <http://www.elections.ca/; Elections Ireland, <http://www.environ.ie/>; Jamaica Elections, <http://lanic.utexas.edu/la/cb/jamaica/>; Malta Elections, <http://www.maltadata.com/>; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives,<http://clerk.house.gov/>.

Another useful indicator of competitiveness is the percentage of all legislative races decided by fewer than 10% of the voters. FIGURE 2 below reports this measure of competitiveness across elections held by Canada, New Zealand, the United Kingdom, and the United States between 1997 and 2005.[9] The percentage of competitive races in countries with expenditure regulations (Canada, New Zealand, and the United Kingdom) appears *not* to have changed very much and the little that was changed was in a positive direction (*i.e.*, more offices were decided by close elections) between 2000 and 2005. Further, it is interesting to note that the competitiveness of elections in the United Kingdom increased slightly in 2005 just after the adoption of spending ceilings. By comparison, elections in this country are quite uncompetitive and over time have become even less so. For instance, in Canada's 2004 election, 36.5% of all constituency races were competitive; in the same year in the United States, only 7.0% were competitive.

Figure 2: Electoral Competition in Four Common Law Democracies, 1997-2005[1]




[9] Australia, Ireland, Jamaica, and Malta are excluded from further analysis because of the sporadic availability of district-level election data for the period.

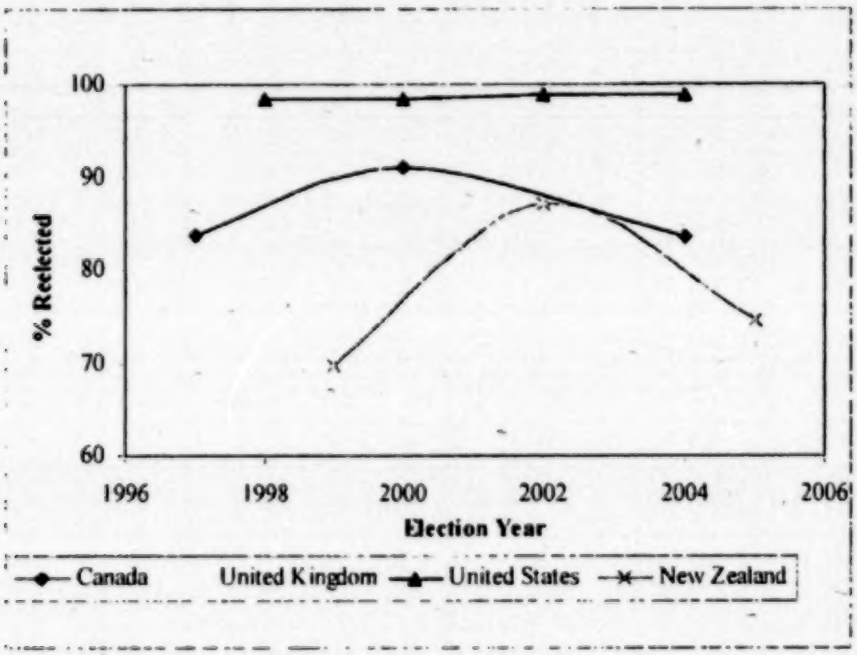
[1]**% Competitive** is the percentage of the legislative races (excluding uncontested races) in an election for which the winner is determined by a majority of less than 10% of the votes. U.S. elections include both House and Senate races.

*Source*: Elections Canada. <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K., <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

Even these two measures of electoral competition (average percent difference and percent competitiveness) do not fully capture the truly uncompetitive character of legislative races in the U.S. Two additional measures (incumbent reelection rate and percent of uncontested race) better illustrate the lack of competitiveness in this country.

The rate of incumbent reelection in Congress (see Figure 3 below) exceeds that found in all the other common law democracies with expenditure limits by substantial margins. By comparison, incumbents are reelected in the other common law democracies on average 83.1% of the time. Only the United Kingdom comes close to sharing the sort of incumbency election rates seen in the United States (around 99.0%), as in 2001 when 96.7% of British incumbents were returned to parliament. Yet not only are incumbents in the United States reelected far more often than in other countries, but a significant percentage of them go unchallenged in every election cycle. Over the last four legislative elections in the United States, 17.6% of incumbents went unopposed. Yet in the three most recent elections organized by each of the other three common law democracies, *every* constituency race was contested by multiple candidates. If in the United States the percent of a winner's majority in an uncontested race is understood to be 100.0%, then the average majority over the four most recent legislative elections would be 43.0%. Elections in the United States are far less competitive than in countries with spending limits.

Figure 3: Incumbent Reelection in Four Common Law Democracies, 1997-2005




**% Reelected** is the percent of incumbents returned to office that sought reelection. U.S. elections include both House and Senate races.

*Source*: Elections Canada, <http://www.elections.ca/; Elections New Zealand, <http://www.elections.org.nz/>; The Electoral Commission, U.K. <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, <http://clerk.house.gov/>.

The United States lags behind common law democracies in conducting elections that are contested and highly competitive (see Table 1 below). Whatever may account for this difference in the levels of competitiveness between the United States and the other common law democracies, it is clear that expenditure limits do not reduce competition. Indeed, elections in these three countries that restrict expenditures are more competitive than those in the United States, which does not.

Table 1: Competitiveness of Elections in Common Law Democracies, 1997-2005[1]

| Country Election Year | Competition Index (a) avg. % diff. | Competition Index (b) % races <20% | Competition Index (c) % races >30% | Uncontested Elections % of total | Incumbent Reelection % reelected |
|---|---|---|---|---|---|
| **Canada** | **21.71** | **53.3** | **27.8** | **0.0** | **86.1** |
| 1997 | 20.83 | 56.3 | 24.7 | 0.0 | 83.7 |
| 2000 | 23.84 | 47.7 | 31.3 | 0.0 | 91.0 |
| 2004 | 20.45 | 56.0 | 27.4 | 0.0 | 83.5 |
| **United Kingdom** | **22.13** | **51.0** | **27.0** | **0.0** | **86.1** |
| 1997 | 24.21 | 49.0 | 34.0 | 0.0 | 72.3 |
| 2001 | 22.85 | 49.0 | 28.0 | 0.0 | 96.7 |
| 2005 | 19.34 | 55.0 | 19.0 | 0.0 | 89.3 |
| **United States[2]** | **30.76** | **28.5** | **51.0** | **17.6** | **98.7** |
| 1998 | 29.60 | 36.1 | 44.9 | 21.8 | 98.5 |
| 2000 | 31.15 | 29.1 | 52.6 | 15.2 | 98.5 |
| 2002 | 31.24 | 25.0 | 54.7 | 18.6 | 99.0 |
| 2004 | 31.05 | 23.7 | 51.9 | 14.9 | 98.8 |
| **New Zealand** | **19.70** | **52.6** | **18.5** | **0.0** | **77.1** |
| 1998 | 20.85 | 47.8 | 19.4 | 0.0 | 69.6 |
| 2002 | 21.60 | 50.7 | 27.5 | 0.0 | 87.0 |
| 2005 | 16.65 | 59.4 | 8.7 | 0.0 | 74.6 |

[1]Data covers 3 or 4 legislative elections from each country.

[2]Includes both House and Senate races.

*Source*: Elections Canada, available at <http://www.elections.ca/; Elections New Zealand, available at <http://www.elections.org.nz/>; The Electoral Commission, U.K., available at <http://www.electoralcommission.org.uk/>; Office of the Clerk, U.S. House of Representatives, available at <http://clerk.house.gov/>.

## B. There is No Evidence that Expenditure Limits Impair Freedom of Speech or the Press

The evidence from democracies abroad suggests that expenditure limits do not weaken civil and political rights or free speech and the press. Democracies that limit campaign spending safeguard their citizens' rights, liberties, and

freedoms, and for every year between 1995 and 2004, countries with expenditure limits on average earned higher "freedom scores" (according to Freedom House) than countries without the ceilings.[10] In fact, no democracy experienced a decline in its score for protecting free expression after introducing limits on expenditures, and some have actually seen marked improvement. Thus, it is not surprising that no successful challenge has yet been lodged against party and candidate spending provisions in any other democracy, nor has any court of highest appeal determined that limits on party or candidate expenditures reduces free speech or association.[11]

Freedom House (FH) annually judges the status of freedom for each country in the world, by assessing the degree to which a country fosters the norms and institutions that are fundamental to a free society. A "freedom score" is constructed accordingly to how well a country performs along two dimensions, *political rights* and *civil liberties*, and is based on a scale of 1 to 7 (most to least free). Countries with a score of 1 organize free and fair elections with multiparty competition, encourage free speech and press, protect minority rights, and support an equitable system of rule of law. The FH score is widely employed in political science research as one of the most authoritative, comprehensive, reliable, valid, and precise measures of freedom and democracy available. Amici base the subsequent analysis on a

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[10] Freedom House (FH) is a non-governmental organization that "supports the expansion of freedom in the world." *See* <www.freedomhouse.org>.

[11] Our thorough search for all available dates for Commonwealth and Foreign Nations (including Australia, Canada, New Zealand, and the United Kingdom) produced no cases in which a higher court held that campaign expenditure limits are *per se* unconstitutional. The closest case is *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, in which the Canadian Supreme Court *upheld* the constitutionality of restrictions on "third-party" spending.

sample of 84 "free" democracies by cross-referencing the FH "Freedom in the World" data with the campaign finance data compiled by IDEA, a Stockholm-based, non-governmental organization dedicated to democracy promotion.[12]

Levels of freedom in democracies with spending limits are high and improving. From 1995 to 2004, countries that limited campaign expenditures averaged political rights and civil liberties scores of 1.25 and 1.86, respectively, for a sum score of 3.11. Lower FH scores indicate greater freedom. (See Figure 4 below.) Democracies that adopted limits on expenditures also became freer over the period, witnessing a 9.7 percent increase in freedom (from a score of 3.07 to 2.77). If expenditure limits adversely affect free association and expression as some claim, then this trend should have been reversed or the scores should have reflected lower than average levels of freedom.

Figure 4 also shows that countries with limits on spending consistently garnered better freedom scores than those without limits for each year and for the period as a whole. Democracies without expenditure limits have average scores in political rights and civil liberties of 1.52 and 1.99 for the period, with a sum score of 3.51. Thus, on average, according to the most authoritative, comprehensive, reliable, valid, and precise measure of freedom used by political scientists, countries with campaign ceilings were actually 11.4 percent freer. The data suggest that campaign spending limits do not impair free speech and association.

In addition, no single democracy that regulates campaign spending witnessed a diminution, and some even experienced improvement in freedom. Indeed, the gains in freedom observed in Figure 4 above may be largely explained by examining four new democracies and their experience with

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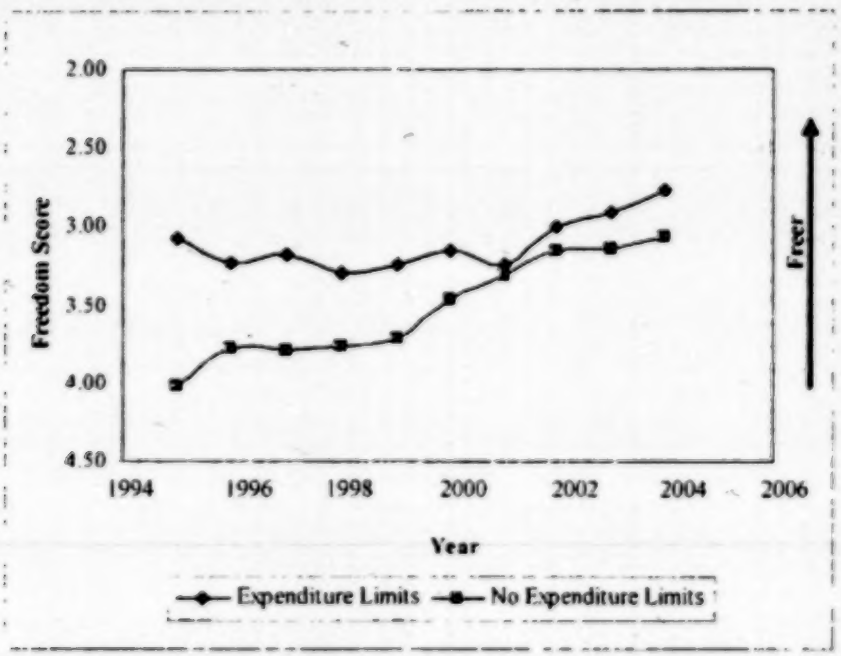
[12] IDEA (2001), "Funding of Political Parties and Election Campaigns."

spending limits. As Figure 5 illustrates, the protection of political rights and freedoms, including free speech and the press, improved in Brazil, Mexico, Taiwan, and Thailand either in the year expenditure limits were introduced or in the year of an election where the limits were first enforced. The United Kingdom also improved in 2001, the year in which the country overhauled its campaign finance system and introduced ceilings on spending. Though these gains are doubtless the result of a complex set of events that have reshaped democracies throughout the world, it is nonetheless revealing that improvements and not declines occurred in these countries in the very years that spending limits were adopted.

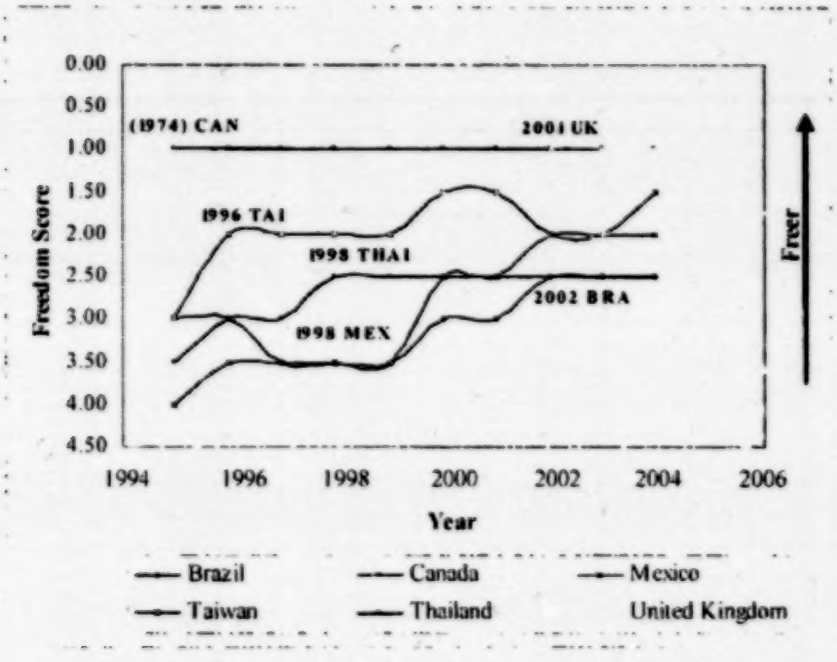
Figure 4: Freedom in Democracies with Expenditure Limits, 1995-2004[1]




[1]Freedom Score averages the countries' scores for political rights and civil liberties each and then sums the averages together into a composite score in order to minimize the differences between two populations.

*Source*: Freedom House (2005). "Freedom in the World," available at <www.freedomhouse.org>.

Figure 5: Levels of Freedom After Adopting Expenditure Limits, 1995-2004[1]




[1]Freedom Score takes the average of a country's political rights and civil liberties score.

*Source*: Freedom House (2005), "Freedom in the World," available at <www.freedomhouse.org>.

Another revealing finding is that among all of the democracies abroad with a tradition of judicial review, no court of highest appeal has come to the conclusion that spending limits are a *per se* violation of rights of free speech, association, or press freedom. Canada's campaign finance jurisprudence is of particular interest. Canada adopted spending limits for parties and candidates with the Elections Expenses Act of 1974, and subsequently extended the limits for nomination races in 2003. *See* Canada Elections Act, S.C. 2000, c. 9,[13] amended by S.C. 2003, c.19. Yet no direct constitutional challenge to the expenditure limits themselves has ever succeeded in any Canadian court of appeal.

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[13] Available at <http://www.elections.ca/loi/ref/act.pdf>.

In 1974 alongside the party and candidate spending ceilings, the Canadian parliament also prohibited third-party groups from spending money to directly support or oppose candidates or parties, though the government did not regulate money spent to promote political issues. This restriction on third-party spending sparked a series of legal challenges spanning two decades, which were finally decided in *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827. In *Harper*, the Supreme Court of Canada upheld the constitutionality of regulating interest-group spending, which at the time was capped at $3,000 per candidate and $150,000 for all election-related spending on candidates and parties. The Court held that limits in general did not violate citizens' freedom of expression, right to vote, or freedom to associate.[14]

The fact that no challenge has yet been lodged against party and candidate spending provisions reveals a remarkable consensus on their constitutionality among the countries' legal and political leadership. This consensus appears to be shared among the leaders of the other democracies abroad. Ironically, even though the Watergate scandal and the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 15, 18, 26, 47 U.S.C.), motivated many democracies to adopt their own spending limits, no higher court has since followed the arguments set forth in *Buckley* in striking down their constitutionality.

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[14] *Harper v. Canada, A.G.* [2004] 1 S.C.R. 827, available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0827.html>.

## II. Politically Advanced and Economically Developed Democracies are More — not less — Likely to Limit Expenditures and Contributions

Countries with the finest democratic traditions, that are most similar to the United States in institution and history, like Canada, the United Kingdom, and New Zealand, and that are highly developed, are precisely the ones that typically regulate expenditures and contributions. Of the 84 "free" democracies, 65 or 77.4% have campaign finance regulations.[15] Moreover, 53.8% or 14 of 26 advanced democracies limit contributions, expenditures, or both.[16]

In comparison, only 32.8 percent (19 out of 58) of *new* democracies regulate contributions, expenditures, or both. As these democracies become more consolidated, they are more likely to adopt limits on campaign expenditures and contributions.

Countries with expenditure and contribution limits are also more advanced economically. The average income (GDP/capita) of a democracy that limits expenditures, contributions, or both is $17,705 as compared with an income of $13,084 for a democracy without the limits. This confirms other evidence — that economic as well as political development increase the chances that a democracy will adopt expenditure

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[15] Regulations here include expenditure and contribution limits and direct and indirect forms of public campaign finance. If disclosure and other provisions are considered, the percentage of countries with some form of campaign finance regulation increases. IDEA (2001), "Funding of Political Parties and Election Campaigns," available at <http://www.idea.int/publications/funding_parties/upload/full.pdf>.

[16] Advanced democracies are those that were established before 1970. New democracies are those that were established after 1970. Some of the other democracies that limit expenditures include Belgium, France, Israel, Italy, Spain, and Portugal.

and contribution ceilings to combat the rising costs associated with running a campaign.[17]

## Conclusion

*Buckley v. Valeo* appeared to equate campaign expenditures with free speech, implying that limiting the first would also limit the second. Because of that ruling, the United States does not have the experience to test the validity of the equation, but there are many experiences abroad that allow us to draw some conclusions. In this brief, we have surveyed those cases, focusing particular attention upon those countries with political traditions and institutions most like those of the United States. We have found no evidence that limits on campaign expenditures impair the freedom of speech. Indeed, the evidence points in the opposite direction: those countries that have restricted campaign spending have higher levels of political freedom, and those that have adopted such restrictions have improved their levels of freedom. If the United States limits campaign spending, there would be no guarantees that freedom and competition would be enhanced, but fears of a loss of freedom and competition are clearly unwarranted.

Respectfully submitted,

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[17] IDEA (2001), "Funding of Political Parties and Election Campaigns," pp 173-176; Herbert Alexander (1994), *Comparative Political Finance Among the Democracies*, Boulder: Westview Press, pp 1-11.

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1528, 04-1530 and 04-1697

In The

# Supreme Court Of The United States

NEIL RANDALL, et al.,
*Petitioners,*
v.
WILLIAM H. SORRELL, et al.,
*Respondents.*

VERMONT REPUBLICAN STATE COMMITTEE, et al.,
*Petitioners,*
v.
WILLIAM H. SORRELL, et al.,
*Respondents.*

WILLIAM H. SORRELL, et al.,
*Cross-Petitioners,*
v.
NEIL RANDALL, et al.,
*Cross-Petition Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, ARKANSAS, CALIFORNIA, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW MEXICO, NEW YORK, OKLAHOMA, RHODE ISLAND, WISCONSIN, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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